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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 BARRY ROSEN,
16
17 Plaintiff,
18 v.
19 EBAY, INC., and DOES 1 through 10,
20 Defendants.
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Case No. CV13-06801 MWF(Ex)

**EBAY'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

Honorable Michael W. Fitzgerald

Date: November 3, 2014

Time: 10:00 a.m.

Courtroom: 1600

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant eBay Inc. (“eBay”) submits this memorandum of points and authorities in opposition to Plaintiff’s motion for partial summary judgment as to liability (Dkt. 94) (“Motion”).

INTRODUCTION

Plaintiff Barry Rosen’s attempt to hold eBay liable for direct, contributory, and vicarious infringement of some 39 of his allegedly copyrighted photographs consists of a scattershot array of arguments that have no basis in law or fact. As a threshold matter, Rosen has failed even to establish that the photographs at issue were registered with the Copyright Office, which is fatal to his claims and moots every other issue in the case. Even if the Court were to reach the merits, Rosen’s claims fail on multiple grounds.

Rather than separate out the two distinct categories of photographs at issue, Rosen’s brief ignores these differences, and thereby fails to acknowledge, let alone address, the separate dispositive legal issues pertaining to each. But as set forth in eBay’s own summary judgment motion, analyzing these categories separately provides the proper legal framework for resolving this dispute.

The first category of images consists of 8”x10” prints of seventeen claimed Rosen photographs (the “8x10 Prints”) that third parties listed for sale on eBay’s website, www.ebay.com. Rosen claims that the online listings for these images infringed his copyrights, but he completely ignores the dispositive legal safe harbor afforded eBay under section 512(c) of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c). The record conclusively demonstrates that Bay complied with the DMCA notice-and-takedown requirements with respect to the 8x10 Prints, which defeats Rosen’s claims directed to these works. Rosen’s claims as to the 8x10 Prints also fail on other grounds as well. There is, for example, no merit to Rosen’s novel theory that the temporary retention of *storage* copies of the

1 images out of the public eye somehow deprives eBay of the intended DMCA
2 protections.

3 The second category of images involves listings by third parties on eBay's
4 website for resales of magazines that allegedly contain one or more of Rosen's
5 photographs (the "Magazine Photos").¹ The import of Rosen's claims as to the
6 Magazine Photos is nothing short of breathtaking: he would hold liable online
7 sellers who accurately depict merchandise containing copyrighted images owned by
8 another, thereby bringing countless lawful secondary-market transactions to a halt.
9 But it is uncontested that the publishers were licensed to use Rosen's photographs
10 in these magazines, and copyright law makes clear that the owner of a lawfully
11 made copy of a copyrighted work has the right to resell it under the "first sale"
12 doctrine. The use of Rosen's images in this context plainly constitutes fair use, as it
13 entails a transformative use for a purpose entirely different from that of the original
14 published photographs. Rosen has adduced no evidence of any potential lost sales
15 or license opportunities caused by this non-superseding, transformative use.

16 Grasping for a viable theory of liability, Rosen devotes inordinate briefing to
17 the specious argument that eBay is liable for infringements allegedly committed by
18 non-party Worthpoint, with which, Rosen concedes, eBay has no direct
19 relationship. Rosen and his proffered expert attempt to spin misinterpreted facts
20 and bald speculation into a fictive scenario in which eBay might somehow be
21 implicated in Worthpoint's purported infringements. The undisputed record
22 evidence provides no basis for this claim.

23 Accordingly, Rosen's motion for summary judgment should be denied.²
24

25 ¹ The chart attached hereto as Appendix A sets out which paragraphs of the Second
26 Amended Complaint pertain to the 8x10 Prints and which to the Magazine Photos.

27 ² eBay's arguments in support of its own motion for summary judgment do not
28 require the Court to consider or decide the copyright registration issue, nor do they
rely upon unsupported and conclusory allegations or the uninformed musings of a
supposed "expert" who has never actually examined eBay's systems. Instead,

COUNTERSTATEMENT OF THE FACTS

A. Rosen’s Failure to Document Registration of His Photos

Rosen alleges that he is a professional photographer and contends that eBay infringed his registered copyrights in thirty-nine photographs. Motion at 1. But there is no evidence that any of the photographs at issue are covered by the registration certificates Rosen has produced. The certificates in the record fall into two categories: (i) ten group registrations which, collectively, are alleged to cover 25 of the works at issue, and (ii) fourteen single registrations, which allegedly cover the remaining fourteen works. *See* Declaration of Barry Rosen, dated Sept. 4, 2014 (Dkt. 94) (“Rosen Decl.”), Ex. 1. The group registrations bear titles such as “Published Works 1998 Pt 1 . . . appx. 42 photos,” but the certificates do not identify any of the dozens of individual photographs that comprise each collection. *See id.* The single registrations bear titles such as “Daisy Fuentes,” and the titles sometimes include what appears to be a number from a series of photographs of the same subject, such as “Anna Kournikova 15.” *See id.* But these certificates do not further describe or identify the particular photographs being registered. In short, Rosen has failed meaningfully to tie these asserted registration certificates to the actual images that are the subject of this lawsuit.

Proof that the allegedly infringing photographs are covered by Rosen’s registrations would require demonstrating that the deposit copies of the works covered by the registrations submitted by Rosen to the Copyright Office constitute or, as to the group registrations, include the challenged images. But Rosen did not save copies of those deposit copies or, for that matter, keep a clear record of what he submitted to the Copyright Office. *See* eBay’s Statement of Genuine Disputes of Material Fact, filed October 3, 2014 (“56.2”) ¶ 1. Despite eBay’s requests to produce or procure such copies, Rosen has been unwilling or unable to do so. *Id.*

eBay’s legal arguments are built upon competent and admissible evidence as to which there is no genuine issue of material fact.

1 **B. eBay and Its Copyright and Other Intellectual Property**
 2 **Compliance Programs**

3 As set forth more fully in eBay’s summary judgment motion, eBay is one of
 4 the world’s largest online marketplaces, connecting a diverse, global community of
 5 buyers and sellers, both individuals and small businesses. *See* eBay’s Proposed
 6 Statement of Uncontroverted Facts and Conclusions of Law, filed Sept. 5, 2014
 7 (Dkt. 74) (“56.1”) ¶¶ 9-12.³ eBay does not itself buy or sell merchandise on its
 8 website; instead, third parties offer goods or services for sale on the site. *Id.* ¶ 15.
 9 It is the legal and contractual responsibility of such users to comply with
 10 appropriate laws pertaining to sales of their items, including respecting third-party
 11 intellectual property rights.

12 Contrary to Rosen’s assertion that eBay takes “no steps” to impede the sale
 13 of items that infringe intellectual property rights, Motion at 9, eBay employs
 14 myriad measures and expends enormous resources directed specifically at impeding
 15 infringement. *See* 56.1 ¶¶ 18-56, 113-17. Indeed, it is eBay’s abiding philosophy
 16 that maintaining a clean, “well-lit” marketplace, and thereby earning the continued
 17 good will of its users, is critical to its commercial success. *Id.* ¶ 19.

18 It is curious that Rosen has chosen to rely heavily, albeit highly selectively,
 19 on factual findings by the district court in *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.
 20 Supp. 2d 463 (S.D.N.Y. 2008), *aff’d in part, rev’d in part*, 600 F.3d 93 (2d Cir.
 21 2010), a trademark infringement case in which eBay’s conduct was completely
 22 vindicated. Virtually the entirety of the factual findings in that case (including, but
 23 not limited to, those excerpted by Rosen) demonstrate eBay’s exemplary
 24 intellectual property compliance efforts. In particular, as the Second Circuit noted
 25 on appeal, eBay devotes extraordinary resources to averting infringements of all

26 ³ To reduce duplication of facts submitted to the Court in connection with the
 27 parties’ cross-motions, eBay cites, where applicable, the facts presented with its
 28 own Motion for Summary Judgment, filed September 5, 2014 (Dkt. 73) (“eBay’s
 Motion for Summary Judgment”).

1 types on its site. *See* 600 F.3d at 98, 100 (noting that eBay deploys hundreds of
 2 employees, has spent “as much as \$20 million each year on tools to promote trust
 3 and safety on its website,” and has “consistently” taken steps to improve its
 4 technology to protect intellectual property and prevent fraud).

5 The *Tiffany* court’s findings fully align with the undisputed fact record here
 6 as to: (i) eBay’s limited ability to detect infringements on its website, both because
 7 it does not take ownership or custody of items sold and because it is not sufficiently
 8 familiar with the products offered by the thousands of rights owners whose
 9 merchandise is sold through the eBay website, 600 F.3d at 98; 56.1 ¶ 17; and (ii)
 10 eBay’s robust “notice-and-takedown” system, which enables rights holders who
 11 believe listings violate their intellectual property rights to notify eBay promptly and
 12 easily, 600 F.3d at 99; 56.1 ¶¶ 20-22, 36-56.⁴

13 Given that eBay’s website processes some 22 million user-uploaded images
 14 per day, examination and review of each image by eBay’s employees is simply not
 15 feasible. 56.1 ¶¶ 17, 59. eBay employees do not create listings for eBay users,
 16 nor, contrary to Rosen’s suggestion, can they “control” the posting of images in
 17 connection with those listings, Motion at 5, other than to specify certain technical
 18 requirements (such as pixel count) so that the images are compatible with eBay’s
 19 systems. *See* 56.1 ¶¶ 60-61; 56.2 ¶ 16. eBay simply provides tools and technology
 20 that allow third-party sellers to create listings that buyers can view. 56.1 ¶¶ 57, 63.
 21 Once initiated by a seller, both the creation of a listing page and the uploading and
 22 storage of any images are fully automated. 56.1 ¶ 61.⁵

23 _____
 24 ⁴ eBay has suspended tens of thousands of repeat offenders in various ways
 25 depending on the frequency and severity of their violations, ranging from
 temporary restrictions on the number of items a seller may list at any given time to
 permanent suspension of the seller’s account. 56.1 ¶¶ 32-35, 116.

26 ⁵ When a seller uploads or references such an image, eBay’s back-end infrastructure
 27 automatically stores a copy of the image for use in connection with the listing. *Id.* ¶
 28 70. Image files are stored on eBay’s servers using an automatically generated URL.
Id. ¶¶ 71-73. eBay’s systems automatically populate listings pages with the
 appropriate image file. *Id.* ¶ 74.

1 Although eBay cannot pre-screen the many millions of images added to its
 2 website each day, through its Verified Rights Owner (“VeRO”) Program (among
 3 other means), eBay provides efficient mechanisms for rights owners to submit a
 4 Notice of Claimed Infringement (“NOCI”) as to particular listings. 56.1 ¶¶ 39, 45.
 5 Again contrary to Rosen’s unsupported allegations, *see* Motion at 9, eBay’s
 6 takedown responses are exemplary, *see Tiffany*, 600 F.3d at 99; in the case of
 7 Rosen’s 8x10 Prints, listings containing those images were taken down within 24
 8 hours. *See* 56.1 ¶¶ 47-48, 88-89.⁶ What is more, eBay’s practice, which it followed
 9 here to the letter, is to notify the sellers and all bidders of the action taken and to
 10 refund any fees associated with the terminated listing, among other things. *Id.* ¶¶
 11 50-52; *see also* 56.2 ¶ 34 (citing Baldwin Declaration).

12 Rosen touts the fact that for a period of time after a given listing has been
 13 taken down, image files formerly associated with the listing may still temporarily
 14 “reside on eBay’s servers.” Motion at 9.⁷ This technological artifact of a taken-
 15 down listing does not alter the dispositive facts that: (1) the listing is no longer
 16 included in the results of searches on eBay’s website; (2) users browsing the
 17 website are no longer able to view the listing; (3) any attempt to revisit the listing
 18 using a saved copy of its URL (such as through a web browser “bookmark”) will
 19 return only a notice that the listing is no longer available; and (4) the image URL,

20
 21 ⁶ Rosen’s chart summarizing his claims reflects that for all but three of the 8x10
 22 “Prints” identified in the fifth column, the “date of last known listing infringement”
 23 was no more than one day after the “Takedown Notice [was] Sent by Rosen to
 24 eBay.” Rosen Decl. ¶ 36 & Ex. 176. In just two instances, eBay took two days,
 25 responding on a Sunday to a notice sent on Friday. *See id.* Ex. 176 at 6; 56.2 ¶¶
 26 217, 220. In one instance, Rosen’s chart asserts incorrectly that eBay took almost a
 27 month to take down a listing, *see id.* at 7, but the record evidence does not support
 28 his assertion. *See* 56.2 ¶ 270.

25 ⁷ There are a number of legitimate reasons that eBay’s systems provide for the
 26 temporary retention of the image files formerly associated with taken-down listings.
 27 56.1 ¶ 54. These include that the DMCA requires service providers to restore
 28 removed content (including images) upon receipt of a valid DMCA counter-notice.
See 17 U.S.C. § 512(g)(2)(c); 56.1 ¶ 54. The images stored on eBay’s servers are
 not permanent; each has a default expiration date (generally 90 days after a listing
 ends). 56.1 ¶¶ 76-77.

1 which is required to access the image, is no longer available on eBay's website.
 2 *See* 56.1 ¶¶ 53-54, 78-79. Short of intentionally keeping copies of image URLs for
 3 purposes of future litigation, as Rosen did, *see* 56.2 ¶ 267, Rosen offers no plausible
 4 theory of how anyone would have accessed images from taken-down listings. And
 5 indeed, the record reveals no instances of anyone accessing Rosen's claimed
 6 images after the listings were taken down—apart, perhaps, from Rosen himself,
 7 who claims to have done so but has no proof to support that claim. *See* 56.1 ¶¶ 94-
 8 97; 56.2 ¶ 7; *see also infra* pp. 11-12.

9 **C. Rosen's Speculation About Worthpoint and Terapeak**

10 Rosen asserts that three of his photographs appeared on an unaffiliated non-
 11 party website, www.worthpoint.com ("Worthpoint"). *See* Second Amended
 12 Complaint (Dkt. 15) ("SAC") ¶¶ 117-20. Although Rosen does not and cannot
 13 assert that eBay has a contractual relationship with Worthpoint, 56.1 ¶ 119, Rosen
 14 tries to link eBay to certain claimed infringements on Worthpoint's website by
 15 virtue of eBay's license relationship with an entirely separate entity, Terapeak.
 16 Rosen speculates that, insofar as eBay has a relationship with Terapeak, and
 17 Terapeak has a "partnership" relationship with Worthpoint—the nature and terms
 18 of which Rosen does not specify—it somehow follows that eBay is responsible for
 19 the claimed Worthpoint infringements. *See* Motion at 8. Rosen's supposed "facts"
 20 regarding Worthpoint and Terapeak consist entirely of hearsay and speculation.
 21 Specifically, the unsworn statements appearing on Worthpoint's and Terapeak's
 22 websites purporting to explain their relationship with one another and their use of
 23 eBay's data are inadmissible hearsay, *see* Motion at 8; Rosen Decl. Exs. 170-72,
 24 while the Declaration of David Sterling offers mere conjecture by a previously
 25 undisclosed "expert" who has no knowledge of eBay's operations or its business
 26 dealings with third parties. Unsurprisingly, a number of Mr. Sterling's assertions
 27
 28

are simply wrong. *See generally* Declaration of Randy Spickler, dated Oct. 2, 2014 (“Spickler Decl.”).⁸

ARGUMENT

I. LEGAL STANDARD

Summary judgment is appropriate only where there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in the non-moving party’s favor. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). “Where material factual disputes exist, the court must allow a jury to resolve the factual disputes.” *Id.*

The movant may not rely on testimony from experts not disclosed during discovery. *See Cont’l Lab. Prods., Inc. v. Medax Int’l, Inc.*, 195 F.R.D. 675, 677 (S.D. Cal. 2000) (striking from record affidavits submitted by experts in opposition to summary judgment motion where the plaintiff failed to disclose the experts during discovery and the defendants were prejudiced). Nor may the movant rely on testimony that he refused to provide during his deposition. *See* Order Denying Plaintiff Barry Rosen’s Motion for Partial Summary Judgment at 2-3, *Rosen v. Amazon.com, Inc.*, No. CV 12-10413 ABC (Ex) (C.D. Cal. Mar. 6, 2014) (Dkt. 71) (striking Rosen’s “blatant attempt to ‘re-do’ his deposition” by submitting a declaration addressing questions he could not or would not answer at his deposition).

⁸ Contrary to Mr. Sterling’s speculation, while eBay does transmit data files to Terapeak containing certain information about items sold, these data files do *not* include image files, nor does eBay license the use of sellers’ images to Terapeak. 56.2 ¶ 33.

II. ROSEN HAS FAILED TO ESTABLISH REGISTRATION OF THE WORKS AT ISSUE

As a threshold matter, Rosen has failed to establish that he registered the copyrights in the works sued upon, as he must to maintain a copyright infringement action. *See* 17 U.S.C. § 411(a); *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir. 1998). Rosen asserts that the registration certificates in the record cover the photographs at issue, *see* Rosen Decl. ¶¶ 2-3 & Ex. 1, but the certificates do not identify the particular photographs they cover, and there is no other record evidence linking Rosen’s registrations to any of the photographs allegedly infringed. *See supra* p. 3.

This failure to prove registration precludes summary judgment for Rosen on all of his copyright infringement claims. *See Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1114-15 (W.D. Wash. 2004), *overruled on other grounds by Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612 (9th Cir. 2010). In *Corbis*, there was “nothing on the face of the certificates . . . to confirm that the Christensen Photo [was] included among the deposited photos,” which meant that “[t]he only way to determine with any certainty whether [the registrations] cover the Christensen Photo [was] to review a copy of the deposits included with the registration applications.” *Id.*⁹ But *Corbis*, like Rosen, had never “bothered to obtain a copy of the deposits and provide them to the Court.” *Id.* at 1115. The court therefore denied summary judgment for the plaintiff on the ground that “[w]ithout the deposit, *Corbis* cannot show that the Christensen Photo is among the photographs covered” by the registrations. *Id.* Similarly here, there is no record evidence tying Rosen’s certificates to the particular photographs allegedly infringed, which precludes summary judgment for Rosen.

⁹ *Corbis* had produced a spreadsheet purporting to link the registrations with the Christensen Photo, but there was “no way to corroborate this link.” *Id.* at 1114.

III. ROSEN'S CLAIMS AS TO THE 8X10 PRINTS FAIL ON MULTIPLE ADDITIONAL GROUNDS

A. eBay Is Shielded From Liability by the DMCA

Rosen's motion conspicuously fails even to acknowledge, let alone address, the DMCA, which protects online service providers like eBay¹⁰ from precisely the sorts of claims brought here concerning listings for the 8x10 Prints. *See* 17 U.S.C. § 512(c) (providing safe harbor for "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider" if certain conditions have been met). As discussed below and in eBay's cross-motion, eBay's VeRO Program, as implemented, met all of the statutory requirements for section 512(c) safe-harbor protection as to the complained-of 8x10 Prints. 56.1 ¶ 41; eBay's Motion for Summary Judgment at 12-16.

Specifically, each time Rosen used eBay's tools to report a listing of an 8x10 Print, eBay complied with the DMCA by promptly taking the reported listings down. 56.1 ¶¶ 85-89. To the extent Rosen's argument might be construed to imply that the DMCA safe-harbor protections are not available to eBay because copies of his images remained stored out of the public eye on eBay's servers after the listings were taken down, *see* Motion at 9, 17, 22, 25, the argument has no merit.

Storage at the Direction of a User. The section 512(c) safe harbor applies to infringing material stored on the service provider's system "at the direction of a user." 17 U.S.C. § 512(c); *see Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1146 (N.D. Cal. 2008). Rosen's claims focus on eBay's processing of his images, but the dispositive fact under the DMCA is that *eBay users selected the images for their listings* and uploaded them using eBay's automated tools. *See supra* p. 5. Every step in creating the listings, including copying the images to

¹⁰ "eBay clearly meets the DMCA's broad definition of online 'service provider.'" *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (citing 17 U.S.C. § 512(k)(1)(B)).

1 accompany those listings, was initiated by users, not by eBay, *see id.*, such that
 2 eBay’s hosting of the images clearly falls within the scope of section 512(c). *See*
 3 *Io*, 586 F. Supp. 2d at 1147-48 (holding that section 512(c) covers “automated
 4 processing of user-submitted content”).

5 **Expeditious Response.** Section 512(c) also requires that upon receiving a
 6 notification of claimed infringement from a copyright owner, the service provider
 7 must “respond[] expeditiously to remove, or disable access to, the material that is
 8 claimed to be infringing.” 17 U.S.C. § 512(c)(1)(C). The record confirms that
 9 eBay expeditiously took down every reported listing for the 8x10 Prints upon
 10 receiving notification from Rosen. *See supra* p. 6. The only instance in which
 11 Rosen even alleges that a listing for an 8x10 Print “wasn’t expeditiously removed,”
 12 SAC ¶ 106, involved a Monday morning take-down in response to a Sunday-
 13 afternoon notification. 56.1 ¶¶ 90-91.¹¹

14 **Remove or Disable Access.** Rosen’s contention that certain images
 15 remained temporarily stored on eBay’s servers after eBay removed listings for the
 16 8x10 Prints has no legal significance. *See* Motion at 9, 17, 22, 25. By taking the
 17 listings down, eBay in every practical and realistic sense “remove[d], or disable[d]
 18 access to, the material.” 17 U.S.C. § 512(c)(1)(C). Searches of eBay’s website no
 19 longer would have returned the listings (or images associated with them), and any
 20 attempt to revisit a listing using a saved copy of its URL would have returned only
 21 a notice that the listing was no longer available. *See supra* p. 6. This explains why
 22 Rosen has failed to show that *anyone other than perhaps himself* (and even that is
 23 disputed) accessed the images on eBay’s servers after eBay took the listings down.
 24 *See* 56.1 ¶¶ 94-97; 56.2 ¶¶ 7, 24. Rosen himself went to extraordinary lengths—
 25 solely to build a litigation record—to locate these images on eBay’s servers after
 26

27 ¹¹ eBay was unaware of the alleged infringements prior to receiving these NOCIs.
 28 56.1 ¶ 88; *see* 17 U.S.C. § 512(c)(1)(A).

1 the listings were taken down.¹² Furthermore, Rosen conceded he does not know if
 2 cached copies of the images were cleared from his own computer before he
 3 attempted to “access” the images on eBay’s servers. 56.1 ¶ 94. Accordingly, Rosen
 4 has failed even to show that *he* accessed eBay’s server copies instead of merely
 5 viewing the cached copies automatically saved locally on his own computer while
 6 the listings were still active. 56.2 ¶¶ 7, 267 (citing Spickler Decl.). Indeed,
 7 contrary to his allegations, Rosen testified at his deposition *that he did not believe*
 8 *he was accessing images on eBay’s servers*, but that he was instead accessing
 9 images stored locally on his own computer—meaning that he is seeking to hold
 10 eBay liable for the contents of his own hard drive. *Id.* ¶ 267 (citing Rosen Dep.
 11 187:17-189:20, 192:6-193:25, 247:3-248:8).¹³

12 In all events, the fact that, for legitimate reasons—and without allowing
 13 continued public access to the images—eBay temporarily maintains images
 14 delinked from taken-down listings (*see supra* note 7) should not disqualify eBay or,
 15 by extension, countless other websites, from the protections of the section 512(c)
 16 safe harbor. To conclude otherwise would exalt technological form over real-world
 17 substance. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d
 18 1006, 1019 (9th Cir. 2013) (section 512(c) “recognizes that one is unlikely to
 19 infringe a copyright by merely storing material that no one could access”). To
 20

21 ¹² As noted above, if Rosen accessed an image stored on eBay’s servers after the
 22 listing was taken down, it was only because he copied and saved the image’s unique
 23 URL from a web browser while the listing was active. *See supra* pp. 6-7. Rosen
 24 testified that he copied and saved the image URLs by creating a PDF file of each
 25 listing and storing the PDF on his computer; the PDF contained any images
 26 associated with the listing, along with their URLs. *See* 56.2 ¶ 267.

27 ¹³ Nor could Rosen’s assertion that he accessed server images via third-party search
 28 engines such as Google give rise to any liability on the part of eBay. Third-party
 search engines do not access images on eBay’s servers after eBay takes down the
 listings. *See* 56.2 ¶ 267 (citing Spickler Decl.). Rather, search engines crawl
 eBay’s website and may make a thumbnail copy of an image contained in a listing
 while the listing is active. That copy is stored *on the search engine’s own servers*
 and may be accessible even after eBay takes the listing down because eBay has no
 control over (and consequently no liability for) the search engine’s copies. *See id.*

1 formalistically require a complete expunging even of storage copies of the type
 2 temporarily maintained by eBay also would impede eBay's ability to perform other
 3 legally mandated and operationally efficient functions. *See supra* note 7.

4 **Right and Ability to Control / Direct Financial Benefit.** Section 512(c)
 5 also requires that the defendant "not receive a financial benefit directly attributable
 6 to the infringing activity, in a case in which the service provider has the right and
 7 ability to control such activity." 17 U.S.C. § 512(c)(1)(B). Rosen's argument fails
 8 to address, let alone satisfy, the legal test governing this provision.

9 First, Rosen's "right and ability to control" argument relies on the common-
 10 law standard for vicarious infringement and ignores the different and more
 11 demanding standard of control under the DMCA. The DMCA requires an intimate
 12 level of involvement by the defendant in the alleged infringement, i.e., control of
 13 infringing conduct that goes well beyond the type of control that is required to
 14 implement the remedial measures mandated by the DMCA. *See UMG*, 718 F.3d at
 15 1029-30; *Capital Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 526-35
 16 (S.D.N.Y. 2013); *Hendrickson*, 165 F. Supp. 2d at 1093-94 (holding that eBay
 17 lacked the right and ability to control infringing activity under the DMCA).
 18 Control for purposes of section 512(c)(1)(B) means "something more" than just the
 19 "general ability to locate infringing material and terminate users' access." *UMG*,
 20 718 F.3d at 1030. The requisite control exists only when a service provider
 21 "exert[s] substantial influence on the activities of users." *Id.* (quoting *Viacom Int'l,*
 22 *Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012)). Substantial influence, in
 23 turn, entails exercising substantial and direct authority over infringing conduct,
 24 such as promulgating "detailed instructions regard[ing] issues of layout,
 25 appearance, and content" and then actively monitoring users' compliance with
 26 those instructions. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d
 27 1146, 1173 (C.D. Cal. 2002), *cited in UMG*, 718 F.3d at 1030; *see also Io*, 586 F.
 28 Supp. 2d at 1153 (holding that the defendant lacked right and ability to control

1 infringing activity where there was “no suggestion that Veoh aims to encourage
2 copyright infringement on its system [and] no evidence that Veoh can control what
3 content users choose to upload before it is uploaded”). Rosen has not claimed, let
4 alone proved, that eBay engaged in any such conduct in relation to the challenged
5 listings.

6 This failure of proof makes unnecessary consideration of any asserted
7 financial benefit reaped by eBay from activities that demonstrably did *not* entail a
8 right or ability to control infringing activity within the meaning of section
9 512(c)(1)(B). Nonetheless, the record discloses that eBay receives no financial
10 benefit from the listings it takes down and did not so benefit from listings for the
11 8x10 Prints. To the contrary, eBay refunds all fees when it takes down a listing, as
12 it did in response to each of Rosen’s NOCIs for the 8x10 Prints. 56.2 ¶ 34.

13 Equally unavailing is Rosen’s bald assertion that eBay “increases its ability
14 to charge for advertising on its website” by hosting infringing material that
15 allegedly serves as a “‘draw’ for customers.” Motion at 18-19. Establishing that
16 infringement is a “draw” requires evidence of a “causal relationship” between
17 infringing activity and the defendant’s profit. *Ellison v. Robertson*, 357 F. 3d 1072,
18 1079 (9th Cir. 2004). This can be shown only where the defendant cultivates
19 infringement to attract users. *See, e.g., Columbia Pictures Indus. v. Fung*, 710 F.3d
20 1020, 1045 (9th Cir. 2013) (defendant “attracted primarily visitors who were
21 seeking to engage in infringing activity, as that is mostly what occurred on his sites;
22 and encouraged that infringing activity”); *Arista Records LLC v. Lime Grp. LLC*,
23 784 F. Supp. 2d 398, 428 (S.D.N.Y. 2011) (defendant “promoted [its] infringing
24 capabilities” and “assisted users in committing infringement”). Rosen’s cynical and
25 unfounded characterizations of eBay’s conduct are belied by the record, which
26 reflects a corporate culture and practices aimed at *reducing* instances of
27 infringement on eBay’s site. eBay’s conduct is thus the antithesis of using
28 infringement as a “draw” for customers. *See supra* pp. 4-6.

1 **Other Requirements.** Finally, eBay satisfies all other applicable
2 requirements for the section 512(c) safe harbor.

3 First, there is no dispute that eBay has designated an agent to receive
4 notifications of claimed infringement and displays the agent's contact information
5 online. *See* 17 U.S.C. §512(c)(2); 56.1 ¶ 117.

6 Second, eBay has adopted and reasonably implemented a policy that
7 provides for terminating, in appropriate circumstances, the accounts of sellers who
8 are repeat infringers, *see* 17 U.S.C. § 512(i)(1)(A); *supra* note 4, and informs its
9 users of this policy on its website. *See* § 512(i)(1)(A); 56.1 ¶ 115. Indeed, the
10 record shows that eBay has suspended tens of thousands of repeat offenders
11 pursuant to an escalating series of penalties ranging from temporary restrictions on
12 the number of items a seller may list to permanent suspension of the seller's
13 account. 56.1 ¶¶ 32-35, 116. Against this evidence, Rosen asserts without any
14 support that eBay "often" permits "repeat/serial infringers to continue to
15 auction/sell infringing goods" and that "there is a very high probability that a seller
16 who receives one NOCI will . . . become a serial/repeat infringer." Motion at 9.
17 Such vague and unsupported accusations do not raise a genuine issue of material
18 fact as to the reasonable implementation of eBay's repeat-infringer policy. *See*,
19 *e.g.*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109-11 (9th Cir. 2007)
20 (holding that a reasonably implemented policy can utilize a "variety of procedures"
21 and does not require that the service provider "affirmatively police its users for
22 evidence of repeat infringement"); *Corbis*, 351 F. Supp. at 1103 ("An infringement
23 policy need not be perfect; it need only be reasonably implemented.").

24 Third, Rosen points to no evidence that eBay interferes with, or otherwise
25 fails to accommodate, any "standard technical measures" used by copyright owners
26 to identify or protect their works. 17 U.S.C. § 512(i)(1)(B).

27 Accordingly, Rosen's allegations of infringement pertaining to listings of his
28 8x10 Photos are shielded from liability by eBay's compliance with the safe harbor

1 provisions of section 512(c) of the DMCA. This recognition warrants not only
 2 denying Rosen's motion for summary judgment as to such listings but also granting
 3 eBay's cross-motion for summary judgment dismissing those claims.

4 **B. eBay Has Neither Directly Nor Secondarily Infringed Rosen's**
 5 **Copyrights in the 8x10 Prints**

6 Insofar as Rosen has failed to establish proper registrations for his works and
 7 also failed to show that eBay's takedowns of the 8x10 Print listings do not qualify
 8 for DMCA protection, the Court need not even reach Rosen's claims of direct and
 9 secondary infringement related to these listings in order to deny Rosen's summary
 10 judgment motion. Nevertheless, those claims equally have no merit.

11 **1. eBay Did Not Directly Infringe Rosen's Copyrights**

12 Rosen contends that eBay directly infringed his copyrights by various
 13 asserted acts of copying, distribution, and display of his works. Motion at 16-17.
 14 As discussed in eBay's cross-motion, however, Rosen's direct infringement claims
 15 fail because he has not proven that *eBay*, as opposed to eBay *users*, caused any of
 16 the various acts by which he contends his 8x10 Prints were infringed. Direct
 17 infringement of any of the section 106 copyright rights requires volitional conduct,
 18 and "[the] requirement of 'volitional conduct' . . . focuse[s] the inquiry on whether
 19 the defendant directly caused the infringement to take place." *Perfect 10, Inc. v.*
 20 *Giganeews, Inc.*, No. 11-cv-7098 AHM, 2013 WL 2109963, at *5-7 (C.D. Cal. Mar.
 21 8, 2013); *see also Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1067 (9th
 22 Cir. 2014) ("Infringement of the reproduction right requires copying by the
 23 defendant, which comprises a requirement that the defendant cause the copying.")
 24 (internal quotation marks and citations omitted); *Cartoon Network LP, LLLP v.*
 25 *CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008). The "pivotal factor" in
 26 determining whether there was a "volitional act" of infringement is the "initiation
 27 of the act of copying." *In re Autohop Litig.*, No. 12 Civ. 4155 (LTS)(KNF), 2013
 28 WL 5477495, at *5-6 (S.D.N.Y. Oct. 1, 2013), with "copying" understood as

1 “shorthand for the infringing of any of the copyright owner’s five exclusive rights.”
 2 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (quoting
 3 *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir.1989)).

4 The infringing use of a defendant’s automated systems by a third party does
 5 not render the defendant directly liable. As the Ninth Circuit explained in *Fox*:

6 [O]perating a system used to make copies at the user’s
 7 command does not mean that the system operator, rather
 8 than the user, caused copies to be made. Here,
 9 [defendant’s] program creates the copy only in response
 to the user’s command. Therefore, the district court did
 not err in concluding that the user, not [defendant], makes
 the copy.

10 747 F.3d at 1067; *see also Giganews*, 2013 WL 2109963, at *7 (finding no direct
 11 infringement where defendants “simply programmed their servers to automatically
 12 copy, distribute, and display content, including infringing content, uploaded by . . .
 13 users”); eBay’s Motion for Summary Judgment at 11 (citing additional cases). The
 14 record here shows that the eBay sellers who created and uploaded the listings—not
 15 eBay or any of its employees—directly caused the allegedly infringing copying,
 16 display, and distribution by uploading the digital images at issue.

17 Rosen’s reliance on *Hoteling v. Church of Jesus Christ of Latter-Day Saints*,
 18 118 F.3d 199 (4th Cir. 1997), for the proposition that simply making works
 19 *available* for distribution itself infringes a copyright owner’s right of distribution in
 20 violation of section 106(3) of the Copyright Act, Motion at 17, is misplaced.

21 *Hoteling* is widely regarded as an outlier whose holding is limited to its peculiar set
 22 of facts.¹⁴ The overwhelming weight of authority requires a showing that the
 23 defendant *actually distributed copies* of the works in issue to the public. *See, e.g.*,
 24 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (in

25 ¹⁴ The defendant church’s main library held one “legitimate” copy of the plaintiff’s
 26 work but made several unauthorized copies for its branch libraries. The issue was
 27 whether the unauthorized copies available in the branch libraries could be deemed
 28 to have been “distributed” to the public in violation of section 106(3). Rather than
 straightforwardly condemn the copying as infringing the section 106(1)
 reproduction right the court held that the distribution right had been infringed.

1 context of Google’s linking to full-size images on third-party websites, holding that
 2 “distribution” requires “actual dissemination” of a copy); *In re Napster, Inc.*
 3 *Copyright Litig.*, 377 F. Supp. 2d 796, 802-04 (N.D. Cal. 2005) (rejecting *Hotaling*
 4 “to the extent [it] suggests that a mere offer to distribute a copyrighted work gives
 5 rise to liability under section 106(3)”)”; *see also Capitol Records, Inc. v. Thomas*,
 6 579 F. Supp. 2d 1210, 1224-25 (D. Minn. 2008) (expressly rejecting *Hotaling* as
 7 contrary to the “logical statutory interpretation of § 106(3), the body of Copyright
 8 Act case law, and the legislative history of the Copyright Act”); *Elektra Entm’t*
 9 *Grp. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (surveying cases and
 10 rejecting *Hotaling*’s reasoning as “not grounded in the statute”).

11 Even the case Rosen cites, *Atlantic Recording Corp. v. Howell*, 554 F. Supp.
 12 2d 976, 983 (D. Ariz. 2008) (*see* Motion at 13), rejects *Hotaling* and concurs with
 13 “the great weight of authority” that merely making a copyrighted work available is
 14 insufficient to constitute distribution unless a copy has actually been distributed to a
 15 member of the public. *Id.*; *see also London-Sire Records, Inc. v. Doe 1*, 542 F.
 16 Supp. 2d 153, 168 (D. Mass. 2008) (“Merely because the defendant has ‘completed
 17 all the steps necessary for distribution’ does not necessarily mean that a distribution
 18 has actually occurred.”).

19 **2. eBay Did Not Secondarily Infringe Rosen’s Copyrights**

20 Rosen’s attempt to show that eBay is secondarily liable is also unsupported
 21 by the record. Contributory infringement requires that the defendant (1) have had
 22 knowledge of the sellers’ infringing activity and (2) have induced, caused, or
 23 materially contributed to the infringing conduct. *See Perfect 10, Inc. v. Visa Int’l*
 24 *Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007). A computer system operator such
 25 as eBay can be contributorily liable only if it has “actual knowledge that specific
 26 infringing material is available using its system, and can take simple measures to
 27 prevent further damage to copyrighted works, yet continues to provide access to
 28 infringing works.” *Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219, 1222 (C.D.

1 Cal. 2010) (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1172).
 2 Rosen fails to make this showing, as it is undisputed that as soon as eBay learned of
 3 the allegedly infringing 8x10 Prints, it took down the corresponding listings and
 4 thus did *not* “continue[] to provide access” to those allegedly infringing works. *See*
 5 *supra* pp. 11-13; *UMG*, 718 F.3d at 1023 (granting summary judgment for
 6 defendant who “promptly removed infringing material when it became aware of
 7 specific instances of infringement”); *cf. Napster*, 239 F.3d at 1021-22 (holding that
 8 contributory liability exists only where the defendant was aware of specific
 9 infringing material available through its system but failed to remove the material).
 10 In addition, given its prompt removal of listings for the 8x10 Print listings, eBay
 11 did not “induce, cause, or materially contribute” to infringement of Rosen’s works.
 12 *Visa*, 494 F.3d at 796.

13 Nor can Rosen establish vicarious infringement, which requires that the
 14 defendant have (1) the right and ability to supervise the third-party sellers’
 15 allegedly infringing conduct and (2) a direct financial interest in their infringing
 16 activity. *See Visa*, 494 F.3d at 802. Rosen argues (erroneously) that eBay “does
 17 not dispute that has [*sic*] the right and ability to prevent its users from infringing
 18 Rosen’s photographs.” Motion at 21. In fact, although eBay’s policies do prohibit
 19 copyright infringement by users, and eBay can and does suspend the accounts of
 20 users who repeatedly infringe others’ copyrights, eBay cannot “prevent its users
 21 from infringing Rosen’s photographs” because the *users* are responsible for
 22 selecting the images for their listings; eBay *has no legal, operational or other*
 23 *control over these third parties’ activities* such that it could preemptively bar them
 24 from making infringing postings. Vicarious liability requires the right and ability
 25 “to supervise and control the *infringement*, not just affect it.” *Visa*, 494 F.3d at 805
 26 (emphasis added); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1173 (holding
 27 that Google was not vicariously liable because it lacked the “legal right to stop or
 28 limit the direct infringement” by third parties).

1 Vicarious infringement requires not only the “legal right to stop or limit
 2 [users’] allegedly infringing conduct” but also “the practical ability to do so,” *Visa*,
 3 494 F.3d at 816 n.11, and eBay simply does not have the ability (much less the
 4 legal obligation) to actively police the hundreds of millions of listings on its
 5 website for infringement. *See Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d
 6 1068, 1071-72 (9th Cir. 2013) (holding that mobile phone carrier lacked right and
 7 ability to supervise infringing conduct on its network given the system architecture
 8 and the absence of a low-cost, effective way to stop infringement). By contrast, the
 9 Ninth Circuit held that Napster was likely to be vicariously liable only where it had
 10 “the ability to locate infringing material listed on its search indices” and failed to do
 11 so. *Napster*, 239 F.3d at 1024. Similarly, in *Disney Enterprises v. Hotfile Corp.*,
 12 No. 11-20427-CIV, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013), *cited in* Motion
 13 at 20-21, the defendant adopted but failed to properly use technology that it claimed
 14 was “effective in filtering and targeting infringing works.” *Id.* at *41. Unlike in
 15 *Napster* and *Hotfile*, eBay generally *cannot* determine whether items offered for
 16 sale (or images of them) infringe copyrights. *See supra* p. 5. Moreover, the
 17 *Napster* and *Hotfile* defendants’ reluctance to use readily available means to
 18 identify and eliminate infringing material on their sites reflected the fact that their
 19 online services actually encouraged and accommodated infringing uses. *See*
 20 *Napster*, 239 F.3d at 1011-12 (describing MP3 music file-sharing service that
 21 allowed users to copy, index, and distribute music from audio CDs); *Hotfile*, 2013
 22 WL 6336286, at *2-3 (describing “file distribution network” that “reward[ed] users
 23 for giving away access to files they possess”). eBay, in stark contrast, works to
 24 *reduce* infringing uses on its website. *See supra* pp. 4-6.

25 eBay also lacks a direct financial interest in its users’ allegedly infringing
 26 activity. *See Visa*, 494 F.3d at 802. As noted, rather than seeking to profit from
 27 infringement on its site, eBay refunds all fees associated with listings it takes down
 28 through the VeRO process. *See supra* p. 6. The fees eBay charges are not causally

1 related to infringement, as the vicarious infringement standard requires. *See*
 2 *Ellison*, 357 F.3d at 1078-79. Unlike in *Napster*, for example, in which infringing
 3 content was shown to be a “draw” for customers, 239 F.3d at 1023, there is no
 4 similar evidence against eBay, which is committed to creating a safe trading
 5 environment that earns the good will of its users. *See supra* p. 4.

6 **C. eBay Is Not Liable for Worthpoint’s Alleged Infringements**

7 Rosen’s effort to hold eBay liable for a handful of 8x10 Prints that appeared
 8 on Worthpoint—an unaffiliated non-party website with which eBay has no
 9 relationship of any kind—is based entirely on inadmissible hearsay and speculation.
 10 *See supra* pp. 7-8.¹⁵ Rosen speculates that eBay is linked to Worthpoint because
 11 eBay’s licensee, Terapeak (another third party), purportedly provided infringing
 12 material to Worthpoint. *See* Motion at 6-8. But Rosen fails to explain how these
 13 independent sets of relationships could lead to imposition of liability on eBay for
 14 conduct by Worthpoint, and the only record evidence relevant to this claim
 15 contradicts Rosen’s speculative theory of liability. It shows that eBay: (1) has no
 16 agreement with Worthpoint; (2) does not license its sellers’ uploaded images to
 17 Terapeak; and (3) does not transmit image files to Terapeak. *See supra* pp. 7-8 &
 18 n.8. Accordingly, there is no factual basis for an infringement claim against eBay
 19 based on the appearance of three of Rosen’s images on Worthpoint’s website.¹⁶
 20
 21
 22
 23
 24

25 ¹⁵ *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 983-84 & n.28 (9th Cir.
 26 2007) (rejecting “speculative testimony” and “hearsay” because evidence offered in
 summary-judgment papers “must be admissible”).

27 ¹⁶ Rosen admitted that he did not send eBay any DMCA notifications concerning
 28 images on Worthpoint and that “there would be no reason to send eBay a notice”
 about infringing images on Worthpoint. 56.1 ¶ 118; Rosen Dep. 249:21-250:8.

1 **IV. ROSEN’S CLAIMS AS TO THE MAGAZINE PHOTOS ALSO FAIL**
 2 **ON MULTIPLE GROUNDS**

3 **A. Digital Snapshots of the Magazines Posted in Connection with the**
 4 **Lawful Resale of the Magazines Are Fair Use**

5 Rosen has admitted that he licensed the use of the Magazine Photos in the
 6 print magazines. 56.1 ¶ 100.¹⁷ Under the first-sale doctrine, “the owner of a
 7 particular copy or phonorecord lawfully made under [the Copyright Act] . . . is
 8 entitled, without the authority of the copyright owner, to sell or otherwise dispose
 9 of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a). Therefore,
 10 neither the original publication of the magazines nor the resale of lawfully made
 11 copies of the magazines is actionable. Rosen nevertheless apparently takes the
 12 novel position that even though one may sell on eBay print magazines that contain
 13 his work, *posting an image of the magazine in connection with a listing for sale of*
 14 *the magazine is infringing*. See Rosen Decl. ¶ 9. For the reasons explained in
 15 eBay’s cross-motion, the Magazine Photos posted on eBay clearly constitute fair
 16 use. See eBay’s Motion for Summary Judgment at 17-24.

17 As eBay has shown, the first fair-use factor—the purpose and character of
 18 the use, 17 U.S.C. § 107(1)—strongly favors fair use. The “central purpose” of
 19 this inquiry is to determine “whether the new work merely supersede[s] the objects
 20 of the original creation or instead adds something new, with a further purpose or
 21 different character, altering the first with new expression, meaning, or message.”
 22 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal quotation
 23 marks and citations omitted). The incidental use of the Magazine Photos by eBay
 24 users was transformative because it served “an entirely different function” from the

25
 26 ¹⁷ Perhaps recognizing the significance of this admission, Rosen half-heartedly
 27 backpedals in his declaration by vaguely asserting that “some, but not all” of the
 28 Magazine Photos “may have been” licensed. Rosen Decl. ¶ 6. But that contradicts
 Rosen’s prior testimony, see 56.1 ¶ 100, and, indeed, Rosen fails to identify even a
 single Magazine Photo that he contends was not licensed.

1 original photographs. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).
 2 As in *Kelly*, where a search engine’s use of the plaintiff’s photographs served a
 3 different function —“improving access to information on the internet versus artistic
 4 expression,” *id.* at 818-19—use of the Magazine Photos on eBay also served a
 5 different function—indicating that the magazine was for sale and allowing potential
 6 buyers to see the offered item versus artistic/editorial expression.

7 There also is no evidence that this use of the Magazine Photos—a use
 8 directed at promoting lawful sales of second-hand magazines—would have “an
 9 adverse impact on the market of the original” Rosen photographs. *Kelly*, 336 F.3d
 10 at 821; *see* 56.1 ¶¶ 104, 111-12. Thus, the crucial fourth fair-use factor, market
 11 harm, 17 U.S.C. § 107(4), strongly favors fair use. Indeed, because, as explained,
 12 the use is transformative, Rosen does not have the right to foreclose it. *See, e.g.*,
 13 *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006)
 14 (copyright owners “may not preempt exploitation of transformative markets”).

15 The second statutory factor—the nature of the copyrighted work, 17 U.S.C. §
 16 107(2)—is of little moment, as it “may be of limited usefulness where [a] creative
 17 work . . . is being used for a transformative purpose,” *Bill Graham Archives*, 448
 18 F.3d at 612, nor does the third factor—the amount and substantiality of the portion
 19 used, 17 U.S.C. § 107(3)—help Rosen. As in *Kelly*, copying Rosen’s photos in
 20 their entirety was “reasonable” because it was “necessary . . . to copy the entire
 21 image to allow users to recognize the image.” 336 F.3d at 821. Thus, all four
 22 statutory factors either favor fair use or are neutral.

23 Any doubt about fair use should be resolved in eBay’s favor due to the public
 24 benefits that flow from use of the Magazine Photos on eBay. *See, e.g., Kelly*, 336
 25 F.3d at 819-20 (noting that the defendant’s search engine “benefit[s] the public by
 26 enhancing information-gathering techniques on the internet”). The predictably
 27 crippling impact on secondary markets for a variety of legitimate merchandise if
 28 entities like eBay were barred from permitting sellers to post images of the

1 merchandise underscores the strong public interest in holding that Rosen may not
2 restrict the transformative, non-competing use of his photographs in eBay listings.

3 **B. eBay Did Not Directly Infringe Rosen’s Copyrights in the**
4 **Magazine Photos**

5 Even if fair use did not protect the Magazine Photo listings, Rosen’s direct
6 infringement claims would fail for the same reason as his direct infringement
7 claims with respect to the 8x10 Prints—namely, that eBay did not cause the
8 allegedly infringing acts. *See supra* pp. 16-18. Like the 8x10 Prints, the Magazine
9 Photos appeared on eBay’s website because *eBay users uploaded them* using
10 eBay’s automated systems. Accordingly, eBay is not directly liable even if the
11 images were found to be infringing. *See id.*

12 As to a handful of the Magazine Photos, Rosen argues that eBay directly
13 infringed by “intentionally repost[ing]” listings that had been taken down through
14 the VeRO process. Motion at 17; *see also* Rosen Decl. Ex. 176 (identifying in
15 “Notes” column certain Magazine listings allegedly “willfully reposted by eBay”).
16 But the record shows that it was third-party sellers, not eBay, who created these
17 listings and thus “actually caused the [alleged] infringement.” *Giganews*, 2013
18 WL 2109963, at *9; *see supra* pp. 16-18. The listings reappeared on eBay’s
19 website because eBay reversed its initial decision to take them down after Rosen
20 explained that the printed Magazines did not infringe his copyrights. As a result,
21 eBay determined that the posted images of the Magazines were fair use and thus not
22 actionable. 56.1 ¶ 101; *see also*, e.g., 56.2 ¶¶ 46, 51. The eBay “repostings” are
23 properly viewed not as independent volitional acts but rather as simply
24 reinstating/restoring the user-posted listing, which should not trigger separate
25 copyright-law scrutiny. To conclude otherwise would penalize eBay for responding
26 in good faith to Rosen’s takedown requests while it evaluated the validity of his
27 claims.
28

1 Dated: October 3, 2014

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Appendix A:
Works and Uses At Issue in Second Amended Complaint

<u>SAC Ex.</u>	<u>SAC ¶¶</u>	<u>Item No.</u> ¹⁹	<u>Subject</u>	<u>Published?</u>	<u>Type of Use</u>
Ex. 1	11, 13, 18, 20, 22, 24	12	Sofia Vergara	Yes	magazine
Ex. 2	12, 14, 19, 21, 23, 25	12	Sofia Vergara	Yes	magazine
Ex. 3	15	13	Sofia Vergara	Yes	8x10
Ex. 4	16	13	Sofia Vergara	Yes	8x10
Ex. 5	17	13	Sofia Vergara	Yes	8x10
Ex. 6	26, 37, 43, 51, 59, 65	6	Joanna Krupa	Yes	magazine
Ex. 7	27, 38, 60, 66	6	Joanna Krupa	Yes	magazine
Ex. 8	28, 39, 45, 53, 61-62, 67	6	Joanna Krupa	Yes	magazine
Ex. 9	29, 40, 46, 54, 68	6	Joanna Krupa	Yes	magazine
Ex. 10	30, 47, 55	6	Joanna Krupa	Yes	magazine
Ex. 11	31, 48, 56	6	Joanna Krupa	Yes	magazine
Ex. 12	32	6	Joanna Krupa	Yes	magazine
Ex. 13	33	6	Joanna Krupa	Yes	magazine
Ex. 14	34	6	Joanna Krupa	Yes	magazine
Ex. 15	35, 41, 49, 57, 63, 69	6	Joanna Krupa	Yes	magazine
Ex. 16	36, 42, 50, 58, 64, 70	6	Joanna Krupa	Yes	magazine
Ex. 17	44, 52	8	Joanna Krupa	Yes	magazine
Ex. 18	71	3	Natalia Sokolova	Yes	magazine

¹⁹ “Item No.” refers to the number assigned to the work at issue in Exhibit A to Plaintiff’s Second Amended Complaint, dated December 16, 2013.

<u>SAC Ex.</u>	<u>SAC ¶¶</u>	<u>Item No.</u> ¹⁹	<u>Subject</u>	<u>Published?</u>	<u>Type of Use</u>
Ex. 19	72	3	Natalia Sokolova	Yes	magazine
Ex. 20	73, 76-77	3	Natalia Sokolova	Yes	magazine
Ex. 21	74, 78, 80	30	Natalia Sokolova	Yes	magazine
Ex. 22	75, 79, 81	29	Natalia Sokolova	Yes	magazine
Ex. 23	82, 84	19	Priscilla Taylor	Yes	magazine
Ex. 24	83, 85	19	Priscilla Taylor	Yes	magazine
Ex. 25	86	21	Daisy Fuentes	Yes	8x10
Ex. 26	87	22	Daisy Fuentes	No	8x10
Ex. 27	88	28	Angela Taylor	Yes	magazine
Ex. 29	88	28	Angela Taylor	Yes	magazine
Ex. 30	89	28	Angela Taylor	Yes	magazine
Ex. 31	90	28	Angela Taylor	Yes	magazine
Ex. 32	91	28	Angela Taylor	Yes	magazine
Ex. 33	92	18	Jeri ("Jerry") Ryan	Yes	8x10
Ex. 34	93	23	Tawny Kitaen ("Tawny Kitten")	Yes	8x10
Ex. 35	94	2	Chase Masterson	No	8x10
Ex. 36	95	2	Chase Masterson	No	8x10
Ex. 37	96	2	Chase Masterson	No	8x10
Ex. 38	97	1	Anna Kournikova	Yes	8x10
Ex. 39	98	1	Anna Kournikova	Yes	8x10
Ex. 40	99	25	Anna Kournikova	Yes	8x10
Ex. 41	100	25	Anna Kournikova	Yes	8x10
Ex. 42	101	24	Gena Lee Nolin	Yes	8x10
Ex. 43	102	26	Gena Lee Nolin	Yes	8x10

<u>SAC Ex.</u>	<u>SAC ¶¶</u>	<u>Item No.</u> ¹⁹	<u>Subject</u>	<u>Published?</u>	<u>Type of Use</u>
Ex. 44	103	27	Ali Landry	No	8x10
Ex. 45	105	31	Jeri (“Jerry”) Ryan	Yes	8x10
Ex. 46	106	32	Erika Eleniak	No	8x10
Ex. 50	111	33	Anna Kournikova	Yes	8x10
Ex. 51	111, 112	33	Anna Kournikova	Yes	8x10
Ex. 52	112	33	Anna Kournikova	Yes	8x10
Ex. 53	113-114	34	Anna Kournikova	Yes	magazine
Ex. 54	115	38	Ali Landry	No	8x10
Ex. 55	116	39	Anna Kournikova	Yes	8x10
Ex. 56	117, 119	36	Gena Lee Nolin	Yes	8x10
Ex. 59	not referenced in SAC	n/a	Gena Lee Nolin	Unclear	8x10
Ex. 60	120	26	Gena Lee Nolin	Yes	8x10
Ex. 61	118	36	Gena Lee Nolin	Yes	8x10